



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 04/16/2008

(Per: RPN/RLR)



Appendix A ... Part 11 of 16

The 2007 drafting file for LRB-2341/1

has been transferred to the drafting file for

**2007 LRB-0517**

**(AB 400 ... Wisconsin Act 200)**

The attached 2007 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the attached drafting file were added, as an appendix, to the new 2007 drafting file. This section will be scanned and added, as a separate appendix, to the electronic drafting file folder.



State of Wisconsin  
2007 - 2008 LEGISLATURE

LRB-2341/P2

RPN/wjsh

stays.

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Wednesday  
please

Regen

- 1 AN ACT ~~to create~~ 302.31 (1m) and chapter 322 of the statutes; **relating to:** the
- 2 Wisconsin code of military justice and providing penalties.

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***Analysis by the Legislative Reference Bureau***

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

- 3 SECTION 1. 302.31 (1m) of the statutes is created to read:
- 4 302.31 (1m) The detention of persons subject to confinement under s. 322.11.

- 5 SECTION 2. Chapter 322 of the statutes is created to read:

6 CHAPTER 322

7 CODE OF MILITARY JUSTICE

8 SUBCHAPTER I

9 GENERAL PROVISIONS

(1) **322.001 Criminal code interaction.** (1) Chapters 939, 967 to 973, and 975 to 979 do not apply to proceedings under this chapter.

(2) A crime under this code is a crime under s. 939.12. A felony under this code is a felony under s. 939.22 (12). A misdemeanor under this code is a misdemeanor under s. 939.22 (20).

(6) **322.01 Article 1—Definitions.** In this chapter, unless the context otherwise requires:

(1) “Accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(2) “Cadet,” “candidate,” or “midshipman” means a person who is enrolled in or attending a state military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in a state military force.

(3) “Classified information” means any of the following:

(a) Any information or material that has been determined by an official of the United States or any state subject to law, an executive order, or regulation to require protection against unauthorized disclosure for reasons of state security or national defense or foreign relations of the United States.

(b) Any restricted data, as defined in 42 USC 2014 (y).

(4) “Code” means this chapter.

(5) “Commanding officer” includes only commissioned officers of the state military forces and shall include officers in charge only when administering

① nonjudicial punishment under s 322.15<sup>0</sup>. The term 'commander' has the same  
2 meaning as 'commanding officer' unless the context otherwise requires.

3 (6) "Convening authority" includes, in addition to the person who convened the  
4 court, a commissioned officer commanding for the time being or a successor in  
5 command to the convening authority.

6 (7) "Day" means calendar day and is not synonymous with the term "unit  
7 training assembly." Any punishment authorized by this code which is measured in  
8 terms of days shall, when served in a status other than annual field training, be  
9 construed to mean succeeding duty days.

10 (8) "Duty status other than state active duty" means any other type of duty  
11 including Unit Training Assemblies or drills but excludes duty not in federal service  
12 and not full-time duty in the active service of the state; under an order issued by  
13 authority of law and includes travel to and from duty.

14 (9) "Enemy" includes organized forces of the enemy in time of war, any hostile  
15 body that U.S. or state forces may be opposing, such as a rebellious mob or band of  
16 renegades, and includes civilians as well as members of military organizations.  
17 Enemy is not restricted to the enemy government or its armed forces.

18 (10) "Enlisted member" means a person in an enlisted grade.

19 (11) "Forfeiture" means a permanent loss of entitlement to pay or allowances  
20 and any forfeiture under this code is not a forfeiture for purposes of Article X, Section  
21 2, of the Wisconsin constitution.

22 (12) "Judge advocate" means a commissioned officer of the organized state  
23 military forces who is an attorney licensed to practice in this state or a member in  
24 good standing of the bar of the highest court of another state, and is any of the  
25 following:

1 (a) Certified or designated as a judge advocate in the Judge Advocate General's  
2 Corps of the army, air force, navy, or the marine corps or designated as a law  
3 specialist as an officer of the coast guard, or a reserve component of one of these.

4 (b) Certified as an non-federally recognized judge advocate, under regulations  
5 promulgated subject to this provision, by the senior judge advocate of the commander  
6 of the force in the state military force of which the accused is a member, as competent  
7 to perform military justice duties required by this code. If there is no judge advocate  
8 available, then certification may be made by the senior judge advocate of the  
9 commander of another force in the state military forces, as the convening authority  
10 directs.

11 (13) "Military court" means a court of inquiry under s. 322.135 or a court  
12 martial. *no 2010*

13 (14) "Military judge" means an official of a general or special court-martial  
14 detailed under s. 322.26.

15 (15) "Military offenses" means those offenses prescribed under articles 77,  
16 principals; 78, accessory after the fact; 80, attempts; 81, conspiracy; 82, solicitation;  
17 83, fraudulent enlistment, appointment, or separation; 84, unlawful enlistment,  
18 appointment, or separation; 85, desertion; 86, absence without leave; 87, missing  
19 movement; 88, contempt toward officials; 89, disrespect towards superior  
20 commissioned officer; 90, assaulting or willfully disobeying superior commissioned  
21 officer; 91, insubordinate conduct toward warrant officer, noncommissioned officer,  
22 or petty officer; 92, failure to obey order or regulation; 93, cruelty and maltreatment;  
23 94, mutiny or sedition; 95, resistance, flight, breach of arrest, and escape; 96,  
24 releasing prisoner without proper authority; 97, unlawful detention; 98,  
25 noncompliance with procedural rules; 99, misbehavior before the enemy; 100,

subordinate compelling surrender; 101, improper use of countersign; 102, forcing a safeguard; 103, captured or abandoned property; 104, aiding the enemy; 105, misconduct as prisoner; 107, false official statements; 108, military property — loss, damage, destruction, or wrongful disposition; 109, property other than military property — waste, spoilage, or destruction; 110, improper hazarding of vessel; 111, drunken or reckless operation of a vehicle, aircraft, or vessel; 112, drunk on duty; 112a, wrongful use, or possession of controlled substances; 113, misbehavior of sentinel; 114, dueling; 115, malingering; 116, riot or breach of peace; 117, provoking speeches or gestures; 120, rape or carnal knowledge; 121, larceny and wrongful appropriation; 122, robbery; 123, forgery; 124, maiming; 126, arson; 127, extortion; 128, assault; 129, burglary; 130, housebreaking; 131, perjury; 132, frauds against the government; 133, conduct unbecoming an officer and a gentleman; and 134, general; of this code.

**(16)** “Nonmilitary offenses” mean offenses which are in the state’s civilian penal statute and are not offenses in this code.

**(17)** “Officer” means a commissioned or warrant officer.

**(18)** “Officer in charge” means a member of the naval militia, the navy, the marine corps, or the coast guard as designated by appropriate authority.

**(19)** “Record,” when used in connection with the proceedings of a court-martial, means any of the following:

(a) An official written transcript, written summary, or other writing relating to the proceedings.

(b) An official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

1           (20) "Senior force commander" means the commander of the same force of the  
2 state military forces as the accused.

3           (21) "Senior force judge advocate" means the senior judge advocate of the  
4 commander of the same force of the state military forces as the accused and who is  
5 that commander's chief legal advisor.

6           (22) "State active duty" means full-time duty in the state military forces under  
7 an order of the governor or otherwise issued by authority of law, and paid by state  
8 funds, and includes travel to and from duty.

9           (23) "State military forces" means the Wisconsin army and air national guard,  
10 the national guard, as defined in 32 USC 502, 503, or 904, the state defense force, the  
11 organized naval militia of the state, and any other military force organized under the  
12 Constitution and laws of the state, and does not include the unorganized militia,  
13 state guard, or home guard, when not in a status subjecting them to exclusive  
14 jurisdiction under 10 USC ch. 47.

15           (24) "Superior commissioned officer" means a commissioned officer superior in  
16 rank or command.

17           (25) "Unit Training Assembly" means an assembly for drill and instruction  
18 which may consist of a single ordered formation of a company, battery, squadron, or  
19 detachment, or, when authorized by the commander, a series of ordered formations  
20 of those organizations.

21           ~~322.02~~ **Article 2—Persons subject to this code; jurisdiction.** (1) Except  
22 as provided in s. 322.03, this code applies only to members of the state military forces  
23 at all times.

24           (2) Subject matter jurisdiction is established if a nexus exists between an  
25 offense under this code and the state military force. Courts-martial have primary

1 jurisdiction of military offenses as defined in s. 322.01. A proper civilian court has  
2 primary jurisdiction of a nonmilitary offense when an act or omission violates both  
3 this code and local criminal law, foreign or domestic. In this case, a court-martial  
4 may be initiated only after the civilian authority has declined to prosecute or  
5 dismissed the charge, provided jeopardy has not attached. Jurisdiction over  
6 attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be  
7 determined by the underlying offense.

8 **322.03 Article 3—Jurisdiction to try certain personnel.** (1) Each person  
9 discharged from a state military force who is later charged with having fraudulently  
10 obtained a discharge is, subject to s. 322.43, subject to trial by court-martial on that  
11 charge and is, after apprehension, subject to this code while in custody under the  
12 direction of the state military forces for that trial. Upon conviction of that charge that  
13 person is subject to trial by court-martial for all offenses under this code committed  
14 before the fraudulent discharge.

15 (2) No person who has deserted from a state military force may be relieved from  
16 amenability to the jurisdiction of this code by virtue of a separation from any later  
17 period of service.

18 **322.05 Article 5—Territorial applicability of the code.** (1) This code has  
19 applicability in all places, provided that either the person subject to the code is in a  
20 duty status or, if not in a duty status, that there is a nexus between the act or omission  
21 constituting the offense and the efficient functioning of the state military forces;  
22 however, this grant of military jurisdiction shall neither preclude nor limit civilian  
23 jurisdiction over an offense.

24 (2) Military courts may be convened and held in units of a state military force  
25 while those units are serving outside the state with the same jurisdiction and powers



as to persons subject to this code as if the proceedings were held inside the state, and offenses committed outside the state may be tried and punished either inside or outside the state.

**322.06 Article 6—Judge advocates.** (1) The senior force judge advocates in each of the state's military forces or that judge advocate's delegates shall make frequent inspections in the field in supervision of the administration of military justice in that force.

(2) Convening authorities shall at all times communicate directly with their judge advocates in matters relating to the administration of military justice. The judge advocate of any command is entitled to communicate directly with the judge advocate of a superior or subordinate command, or with the state judge advocate.

(3) No person who has acted as member, military judge, trial counsel, defense counsel, or investigating officer, or who has been a witness, in any case may later act as a judge advocate to any reviewing authority upon the same case.

## SUBCHAPTER II

### APPREHENSION AND RESTRAINT

**322.07 Article 7—Apprehension.** (1) In this section, "apprehension" means the taking of a person into custody.

(2) Any person authorized by this code or by the Uniform Code of Military Justice, or by regulations issued under either, to apprehend persons subject to this code, any marshal of a court-martial appointed subject to the provisions of this code, and any peace officer or civil officer having authority to apprehend offenders under the laws of the United States or of a state, may do so upon probable cause that an offense has been committed and that the person apprehended committed it.

(3) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code.

(4) If an offender is apprehended outside the state, the offender's return to the state must be in accordance with normal extradition procedures or by reciprocal agreement.

(5) No person authorized by this section to apprehend persons subject to this code or the place where an offender is confined, restrained, held, or otherwise housed may require payment of any fee or charge for so receiving, apprehending, confining, restraining, holding, or otherwise housing a person except as otherwise provided by law.

**322.09 Article 9—Imposition of restraint. (1) In this section:**

(a) "Arrest" means the restraint of a person by an order, not imposed as a punishment for an offense, directing him or her to remain within certain specified limits.

(b) "Confinement" means the physical restraint of a person.

(2) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.

(3) A commissioned officer, a warrant officer, or a civilian subject to this code or to trial there under may be ordered into arrest or confinement only by a commanding officer to whose authority the person is subject, by an order, oral or

1 written, delivered in person or by another commissioned officer. The authority to  
2 order persons into arrest or confinement may not be delegated.

3 (4) No person may be ordered into arrest or confinement except for probable  
4 cause.

5 (5) This section does not limit the authority of persons authorized to apprehend  
6 offenders to secure the custody of an alleged offender until proper authority may be  
7 notified.

8 **322.10 Article 10—Restraint of persons charged with offenses.** Any  
9 person subject to this code charged with an offense under this code may be ordered  
10 into arrest or confinement, as circumstances may require. When any person subject  
11 to this code is placed in arrest or confinement prior to trial, immediate steps shall be  
12 taken to inform the person of the specific wrong of which the person is accused and  
13 diligent steps shall be taken to try the person or to dismiss the charges and release  
14 the person.

15 **322.11 Article 11—Place of confinement; reports and receiving of**  
16 **prisoners.** (1) If a person subject to this code is confined before, during, or after  
17 trial, he or she shall be in a civilian or military confinement.

18 (2) No sheriff or other person authorized to receive prisoners subject to sub. (1)  
19 may refuse to receive or keep any prisoner committed to the person's charge by a  
20 commissioned officer of the state military forces, when the committing officer  
21 furnishes a statement, signed by the officer, of the offense charged against the  
22 prisoner, unless otherwise authorized by law.

23 (3) Every person authorized to receive prisoners subject to sub. (1) to whose  
24 charge a prisoner is committed shall, within 24 hours after that commitment or as  
25 soon as the person is released from guard, report to the commanding officer of the

prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.

322.12 **Article 12—Confinement with enemy prisoners prohibited.** No member of a state military force may be placed in confinement in immediate physical association with enemy prisoners or other foreign nationals not members of the armed forces.

322.13 **Article 13—Punishment prohibited before trial.** No person, while being held for trial or awaiting a verdict, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor shall the arrest or confinement imposed upon the person be any more rigorous than the circumstances required to insure the person's presence, but the person may be subjected to minor punishment during that period for infractions of discipline.

322.14 **Article 14—Delivery of offenders to civil authorities.** (1) A person subject to this code accused of an offense under this code or under the state's civilian penal statute may be delivered to the civil authority for trial or confinement.

(2) When delivery under this section is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for the offense shall, upon the request of competent military authority, be returned to the place of original custody for the completion of the person's sentence.

### SUBCHAPTER III

### NONJUDICIAL PUNISHMENT

322.15 **Article 15—Commanding officer's nonjudicial punishment.** (1) Under regulations as prescribed, any commanding officer, and for purposes of this

1 section, officers-in-charge, may impose disciplinary punishments for minor offenses  
2 without the intervention of a court-martial. The governor, the adjutant general, or  
3 an officer of a general or flag rank in command may delegate the powers under this  
4 section to a principal assistant who is a member of a state military force.

5 (2) Any commanding officer may impose any of the following upon enlisted  
6 members of the officer's command:

7 (a) Admonition.

8 (b) Reprimand.

9 (c) Withholding of privileges for not more than 6 months, which need not be  
10 consecutive.

11 (d) Forfeiture of not more than 7 days' pay.

12 (e) Fine of not more than 7 days' pay.

13 (f) Reduction to the next inferior pay grade, if the grade from which demoted  
14 is within the promotion authority of the officer imposing the reduction or any officer  
15 subordinate to the one who imposes the reduction.

16 (g) Extra duties, including fatigue or other duties, for not more than 14 days,  
17 which need not be consecutive.

18 (h) Restriction to certain specified limits, with or without suspension from duty,  
19 for not more than 14 days, which need not be consecutive.

20 (3) Any commanding officer of the grade of major or lieutenant commander, or  
21 above may impose any of the following upon enlisted members of the officer's  
22 command:

23 (a) Any punishment authorized in sub. (2) (a), (b), and (c).

24 (b) Forfeiture of not more than one-half of one month's pay per month for 2  
25 months.

1 (c) Fine of not more than one month's pay.

2 (d) Reduction to the lowest or any intermediate pay grade, if the grade from  
3 which demoted is within the promotion authority of the officer imposing the  
4 reduction or any officer subordinate to the one who imposes the reduction, but an  
5 enlisted member in a pay grade above E-4 may not be reduced more than 2 pay  
6 grades.

7 (e) Extra duties, including fatigue or other duties, for not more than 45 days,  
8 which need not be consecutive.

9 (f) Restriction to certain specified limits, with or without suspension from duty,  
10 for not more than 60 days, which need not be consecutive.

11 (4) The governor, the adjutant general, an officer exercising general  
12 court-martial convening authority, or an officer of a general or flag rank in command  
13 may impose any of the following penalties:

14 (a) Upon officers of the officer's command, any punishment authorized in sub.  
15 (3) (a), (b), (c), and (f) and arrest in quarters for not more than 30 days, which need  
16 not be consecutive.

17 (b) Upon enlisted members of the officer's command, any punishment  
18 authorized in sub. (3).

19 (5) Whenever any of the punishments under this section are combined to run  
20 consecutively, the total length of the combined punishment cannot exceed the  
21 authorized duration of the longest punishment in the combination, and there must  
22 be an apportionment of punishments so that no single punishment in the  
23 combination exceeds its authorized length under this section.

1           (6) The service member shall have the right to demand trial by court-martial  
2 in lieu of nonjudicial punishment, and shall have the right to consult with a judge  
3 advocate.

4           (7) The officer who imposes the punishment, or the successor in command, may,  
5 at any time, suspend, set aside, mitigate, or remit any part or amount of the  
6 punishment and restore all rights, privileges, and property affected. The officer also  
7 may do any of the following:

8           (a) Mitigate reduction in grade to forfeiture of pay.

9           (b) Mitigate arrest in quarters to restriction.

10          (c) Mitigate extra duties to restriction.

11          (8) The mitigated punishment shall not be for a greater period than the  
12 punishment mitigated. When mitigating reduction in grade to forfeiture of pay, the  
13 amount of the forfeiture shall not be greater than the amount that could have been  
14 imposed initially under this section by the officer who imposed the punishment  
15 mitigated.

16          (9) A person punished under this section who considers the punishment unjust  
17 or disproportionate to the offense may, through the proper channel, appeal to the  
18 next superior authority within 15 days after the punishment is either announced or  
19 sent to the accused, as the commander may determine. The appeal shall be promptly  
20 forwarded and decided, but the person punished may in the meantime be required  
21 to undergo the punishment adjudged. The superior authority may exercise the same  
22 powers with respect to the punishment imposed as may be exercised under sub. (7)  
23 by the officer who imposed the punishment. Before acting on an appeal from a  
24 punishment, the authority that is to act on the appeal may refer the case to a judge  
25 advocate for consideration and advice.

(10) The imposition and enforcement of disciplinary punishment under this section for any act or omission is not a bar to trial by court-martial or a civilian court of competent jurisdiction for a serious crime or offense growing out of the same act or omission and not properly punishable under this section; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial and, when so shown, it shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(11) Whenever a punishment of forfeiture of pay is imposed under this section, the forfeiture may apply to pay accruing before, on, or after the date that punishment is imposed.

(12) Regulations may prescribe the form of records to be kept of proceedings under this section and may prescribe that certain categories of those proceedings shall be in writing.

#### SUBCHAPTER IV

#### COURT-MARTIAL JURISDICTION

**322.16 Article 16—Courts-martial classified.** The 3 kinds of courts-martial in the state military forces are as follows:

(1) General courts-martial, consisting of any of the following:

(a) A military judge and not less than 5 members.

(b) Only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.

(2) Special courts-martial, consisting of any of the following:



1 (a) A military judge and not less than 3 members. An accused may waive  
2 having 12 members and proceed to a special court-martial with not less than 6  
3 members.

4 (b) Only a military judge, if one has been detailed to the court, and the accused  
5 under the same conditions as those prescribed in sub. (1) (b) so requests.

6 (3) Summary courts-martial, consisting of one commissioned officer.

7 **322.17 Article 17—Jurisdiction of courts-martial in general.** Each  
8 component of the state military forces has court-martial jurisdiction over all  
9 members of the particular component who are subject to this code. Additionally, the  
10 state military forces have court-martial jurisdiction over all members subject to this  
11 code.

12 **322.18 Article 18—Jurisdiction of general courts-martial.** Subject to s.  
13 322.17, general courts-martial have jurisdiction to try persons subject to this code  
14 for any offense made punishable by this code, and may, under limitations as the  
15 governor may prescribe, adjudge any punishment not forbidden by this code.

16 **322.19 Article 19—Jurisdiction of special courts-martial.** Subject to s.  
17 322.17, special courts-martial have jurisdiction to try persons subject to this code for  
18 any offense made punishable by this code, and may, under limitations as the  
19 governor may prescribe, adjudge any punishment not forbidden by this code except  
20 dishonorable discharge, dismissal, confinement for more than one year, forfeiture of  
21 pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year.

22 **322.20 Article 20—Jurisdiction of summary courts-martial.** (1) Subject  
23 to s. 322.17, summary courts-martial have jurisdiction to try persons subject to this  
24 code, except officers, cadets, candidates, and midshipmen, for any offense made  
25 punishable by this code under limitations as the governor may prescribe.

(2) No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if that person objects. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered, as may be appropriate. Summary courts-martial may, under limitations as the governor may prescribe, adjudge any punishment not forbidden by this code except dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of one month's pay.

#### SUBCHAPTER V

#### APPOINTMENT AND COMPOSITION

#### OF COURTS-MARTIAL

#### **322.22 Article 22—Who may convene general courts-martial. (1)**

General courts-martial may be convened by any of the following:

- (a) The governor.
- (b) The adjutant general.
- (c) The commanding general officer of any force of the state military forces.
- (d) The commanding officer of a division or a separate brigade.
- (e) The commanding officer of a separate wing.

(2) If any commanding officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by a superior authority if considered desirable by the authority.

#### **322.23 Article 23—Who may convene special courts-martial. (1)**

Special courts-martial may be convened by any of the following:

- (a) Any person who may convene a general court-martial.

(b) The commanding officer of a garrison, fort, post, camp, station, air national guard base, or naval base or station.

(c) The commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the army national guard.

(d) The commanding officer of a wing, group, separate squadron, or corresponding unit of the air national guard.

(e) The commanding officer or officer in charge of any other command when empowered by the adjutant general.

(2) If the officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by a superior authority if considered desirable by the superior competent authority.

**322.24 Article 24—Who may convene summary courts-martial. (1)**

Summary courts-martial may be convened by any of the following:

(a) Any person who may convene a general or special court-martial.

(b) The commanding officer of a detached company or other detachment, or corresponding unit of the army national guard.

(c) The commanding officer of a detached squadron or other detachment, or corresponding unit of the air national guard.

(d) The commanding officer or officer in charge of any other command when empowered by the adjutant general.

(2) When only one commissioned officer is present with a command or detachment that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by that authority.

**322.25 Article 25—Who may serve as a member on courts-martial. (1)**

Any commissioned officer of the state military forces is eligible to serve on all courts-martial for the trial of any person subject to this code.

(2) Any warrant officer of the state military forces is eligible to serve on general and special courts-martial for the trial of any person subject to this code, other than a commissioned officer.

(3) Any enlisted member of the state military forces who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member subject to this code, but that member shall serve as a member of a court only if, before the conclusion of a session called by the military judge under s. 322.39 (1) prior to trial or, in the absence of a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If the members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(4) When it can be avoided, no person subject to this code may be tried by a court-martial any member of which is junior to the accused in rank or grade.

(5) When convening a court-martial, the convening authority shall detail members of the state military forces as, in the convening authority's opinion, are best qualified for the duty by reason of age, education, training, experience, length of

1 service, and judicial temperament. No member of the state military forces is eligible  
2 to serve as a member of a general or special court-martial when that member is the  
3 accuser, a witness, or has acted as investigating officer or as counsel in the same case.

4 (6) Before a court-martial is assembled for the trial of a case, the convening  
5 authority may excuse a member of the court from participating in the case.

6 (7) The convening authority may delegate the authority under this section to  
7 a judge advocate or to any other principal assistant.

8 (8) In this section, "unit" means any regularly organized body of the state  
9 military forces not larger than a company, a squadron, a division of the naval militia,  
10 or a body corresponding to one of them.

11 **322.26 Article 26—Military judge of a general or special court-martial.**

12 (1) A military judge shall be detailed to each general and special court-martial. The  
13 military judge shall preside over each open session of the court-martial to which the  
14 military judge has been detailed.

15 (2) A military judge shall meet all of the following qualifications:

16 (a) Be a commissioned officer of an organized state military force.

17 (b) Be an attorney licensed to practice in this state or be a member of the bar  
18 of a federal court for at least 5 years.

19 (c) Certified as qualified for duty as a military judge by the senior force judge  
20 advocate which is the same force as the accused.

21 (3) In the instance when a military judge is not an attorney licensed to practice  
22 in this state, the military judge shall be deemed admitted on motion, subject to filing  
23 with the senior force judge advocate of the same force as the accused setting forth the  
24 qualifications provided in sub. (2).

1           (4) The military judge of a general or special court-martial shall be designated  
2           by the state senior force judge advocate of the same force as the accused if possible,  
3           or otherwise by the senior of the senior force judge advocates, or a designee, for detail  
4           by the convening authority. Neither the convening authority nor any staff member  
5           of the convening authority shall prepare or review any report concerning the  
6           effectiveness, fitness, or efficiency of the military judge so detailed, which relates to  
7           performance of duty as a military judge.

8           (5) No person is eligible to act as military judge in a case if that person is the  
9           accuser or a witness, or has acted as investigating officer, trial counsel, or defense  
10          counsel in the same case.

11          (6) The military judge of a court-martial may not consult with the members  
12          of the court except in the presence of the accused, trial counsel, and defense counsel  
13          nor vote with the members of the court.

14          **322.27 Article 27—Detail of trial counsel and defense counsel.** (1) For  
15          each general and special court-martial the authority convening the court shall detail  
16          trial counsel, defense counsel, and assistants as are appropriate.

17          (2) No person who has acted as investigating officer, military judge, witness or  
18          court member in any case may act later as trial counsel, assistant trial counsel, or,  
19          unless expressly requested by the accused, as defense counsel or assistant or  
20          associate defense counsel in the same case. No person who has acted for the  
21          prosecution may act later in the same case for the defense nor may any person who  
22          has acted for the defense act later in the same case for the prosecution.

23          (3) Except as provided in sub. (4), trial counsel or defense counsel detailed for  
24          a general or special court-martial must meet all of the following:

25          (a) A judge advocate as defined in this code.

(b) In the case of trial counsel, an attorney licensed to practice in this state.

(4) In the instance when a defense counsel is not an attorney licensed to practice in this state, the defense counsel shall be deemed admitted on motion, subject to filing with the military judge setting forth the qualifications that counsel is all of the following:

(a) Commissioned officer of the armed forces of the United States or a component thereof.

(b) Member in good standing of the bar of the highest court of another state.

(c) Certified as a judge advocate in the Judge Advocate General's Corps of the army, air force, navy, or the marine corps, or a judge advocate as defined in this code.

(5) Trial counsel detailed to a court-martial shall be considered a prosecutor under state statutes.

**322.28 Article 28—Detail or employment of reporters and interpreters.**

Under regulations as may be prescribed, the convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court and may detail or employ interpreters who shall interpret for the court.

**322.29 Article 29—Absent and additional members. (1)** No member of

a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(2) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below 5 members, the trial may not proceed unless the convening authority details new members sufficient in number

1 to provide not less than the applicable minimum number of 5 members. The trial  
2 may proceed with the new members present after the recorded evidence previously  
3 introduced before the members of the court has been read to the court in the presence  
4 of the military judge, the accused, and counsel for both sides.

5 (3) Whenever a special court-martial, other than a special court-martial  
6 composed of a military judge only, is reduced below 3 members, the trial may not  
7 proceed unless the convening authority details new members sufficient in number  
8 to provide not less than 3 members, unless the accused waives the number of  
9 members. The trial shall proceed with the new members present as if no evidence  
10 had been introduced previously at the trial, unless a verbatim record of the evidence  
11 previously introduced before the members of the court or a stipulation is read to the  
12 court in the presence of the military judge, the accused, and counsel for both sides.

13 (4) If the military judge of a court-martial composed of a military judge only  
14 is unable to proceed with the trial because of physical disability, as a result of a  
15 challenge, or for other good cause, the trial shall proceed, subject to any applicable  
16 conditions of s. 322.16 (1) (b) or (2) (b), after the detail of a new military judge as if  
17 no evidence had previously been introduced, unless a verbatim record of the evidence  
18 previously introduced or a stipulation is read in court in the presence of the new  
19 military judge, the accused, and counsel for both sides.

## 20 SUBCHAPTER VI

### 21 PRETRIAL PROCEDURE

22 **322.30 Article 30—Charges and specifications.** (1) Charges and  
23 specifications shall be signed by a person subject to this code under oath before a  
24 commissioned officer authorized by s. 322.136 (1) to administer oaths and shall state  
25 all of the following:



1 (a) The signer has personal knowledge of, or has investigated, the matters set  
2 forth in the charges and specifications.

3 (b) The facts are true to the best of the signer's knowledge and belief.

4 (2) Upon the preferring of charges, the proper authority shall take immediate  
5 steps to determine what disposition should be made in the interest of justice and  
6 discipline, and the person accused shall be informed of the charges as soon as  
7 practicable.

8 **322.31 Article 31—Compulsory self-incrimination prohibited.** (1) No  
9 person subject to this code may compel any person to incriminate himself or herself  
10 or to answer any question the answer to which may tend to incriminate him or her.

11 (2) No person subject to this code may interrogate or request any statement  
12 from an accused or a person suspected of an offense without first informing that  
13 person of the nature of the accusation and advising that person that the person does  
14 not have to make any statement regarding the offense of which the person is accused  
15 or suspected and that any statement made by the person may be used as evidence  
16 against the person in a trial by court-martial.

17 (3) No person subject to this code may compel any person to make a statement  
18 or produce evidence before any military court if the statement or evidence is not  
19 material to the issue and may tend to degrade the person.

20 (4) No statement obtained from any person in violation of this section or  
21 through the use of coercion, unlawful influence, or unlawful inducement may be  
22 received in evidence against the person in a trial by court-martial.

23 **322.32 Article 32—Investigation.** (1) No charge or specification may be  
24 referred to a general court-martial for trial until a thorough and impartial  
25 investigation of all the matters set forth has been made. This investigation shall

1 include inquiry as to the truth of the matter set forth in the charges, consideration  
2 of the form of charges, and a recommendation as to the disposition which should be  
3 made of the case in the interest of justice and discipline.

4 (2) The accused shall be advised of the charges against the accused and of the  
5 right to be represented at that investigation by counsel. The accused has the right  
6 to be represented at that investigation as provided in s. 322.38 and in regulations  
7 prescribed under that section. At that investigation, full opportunity shall be given  
8 to the accused to cross-examine witnesses against the accused, if they are available,  
9 and to present anything the accused may desire in the accused's own behalf, either  
10 in defense or mitigation, and the investigating officer shall examine available  
11 witnesses requested by the accused. If the charges are forwarded after the  
12 investigation, they shall be accompanied by a statement of the substance of the  
13 testimony taken on both sides and a copy shall be given to the accused.

14 (3) If an investigation of the subject matter of an offense has been conducted  
15 before the accused is charged with the offense, and if the accused was present at the  
16 investigation and afforded the opportunities for representation, cross-examination,  
17 and presentation prescribed in sub. (2), no further investigation of that charge is  
18 necessary under this section unless it is demanded by the accused after the accused  
19 is informed of the charge. A demand for further investigation entitles the accused  
20 to recall witnesses for further cross-examination and to offer any new evidence in  
21 the accused's own behalf.

22 (4) If evidence adduced in an investigation under this section indicates that  
23 the accused committed an uncharged offense, the investigating officer may  
24 investigate the subject matter of that offense without the accused having first been  
25 charged with the offense if the accused is afforded all of the following:

1 (a) Present at the investigation;

2 (b) Informed of the nature of each uncharged offense investigated; and

3 (c) Afforded the opportunities for representation, cross-examination, and  
4 presentation prescribed in sub. (2).

5 (5) The requirements of this section are binding on all persons administering  
6 this code but failure to follow them does not constitute jurisdictional error.

7 **322.33 Article 33—Forwarding of charges.** When a person is held for trial  
8 by general court-martial, the commanding officer shall within 8 days after the  
9 accused is ordered into arrest or confinement, if practicable, forward the charges,  
10 together with the investigation and allied papers, to the person exercising general  
11 court-martial jurisdiction. If that is not practicable, the commanding officer shall  
12 report in writing to that person the reasons for delay.

13 **322.34 Article 34—Advice of judge advocate and reference for trial. (1)**  
14 Before directing the trial of any charge by general court-martial, the convening  
15 authority shall refer it to a judge advocate for consideration and advice. The  
16 convening authority may not refer a specification under a charge to a general  
17 court-martial for trial unless the convening authority has been advised in writing  
18 by a judge advocate that all the following conditions are met:

19 (a) The specification alleges an offense under this code.

20 (b) The specification is warranted by the evidence indicated in the report of  
21 investigation under s. 322.32, if there is a report.

22 (c) A court-martial would have jurisdiction over the accused and the offense.

23 (2) The advice of the judge advocate under sub. (1) with respect to a  
24 specification under a charge shall include a written and signed statement by the  
25 judge advocate that does all of the following:

1 (a) Expressing conclusions with respect to each matter set forth in sub. (1).

2 (b) Recommending action that the convening authority take regarding the  
3 specification.

4 (3) If the specification is referred for trial, the recommendation of the judge  
5 advocate shall accompany the specification.

6 (4) If the charges or specifications are not correct formally or do not conform  
7 to the substance of the evidence contained in the report of the investigating officer,  
8 formal corrections, and changes in the charges and specifications as are needed to  
9 make them conform to the evidence, may be made.

10 **322.35 Article 35—Service of charges.** The trial counsel shall serve or  
11 caused to be served upon the accused a copy of the charges. No person may, against  
12 the person's objection, be brought to trial before a general court-martial case within  
13 a period of 5 days after the service of charges upon the accused, or in a special  
14 court-martial, within a period of 3 days after the service of charges upon the accused.

15 SUBCHAPTER VII

16 TRIAL PROCEDURE

17 **322.36 Article 36—Governor may prescribe regulations.** Pretrial, trial,  
18 and post-trial procedures, including modes of proof, for courts-martial cases arising  
19 under this code, and for courts of inquiry, may be prescribed by the governor by  
20 regulations, or as otherwise provided by law, which shall apply the principles of law  
21 and the rules of evidence generally recognized in military criminal cases in the courts  
22 of the armed forces but which may not be contrary to or inconsistent with this code.

23 **322.37 Article 37—Unlawfully influencing action of court.** (1) No  
24 authority convening a general, special, or summary court-martial, nor any other  
25 commanding officer, or officer serving on the commanding officer's staff, may

1     censure, reprimand, or admonish the court or any member, the military judge, or  
2     counsel, with respect to the findings or sentence adjudged by the court or with respect  
3     to any other exercise of its or their functions in the conduct of the proceedings. No  
4     person subject to this code may attempt to coerce or, by any unauthorized means,  
5     influence the action of a court-martial or court of inquiry or any member, in reaching  
6     the findings or sentence in any case, or the action of any convening, approving, or  
7     reviewing authority with respect to their judicial acts. The foregoing provisions of  
8     the subsection shall not apply with respect to the any of the following:

9           (a) General instructional or informational courses in military justice if the  
10          courses are designed solely for the purpose of instructing members of a command in  
11          the substantive and procedural aspects of courts-martial.

12          (b) Statements and instructions given in open court by the military judge,  
13          summary court-martial officer, or counsel.

14          (2) In the preparation of an effectiveness, fitness, or efficiency report, or any  
15          other report or document used in whole or in part for the purpose of determining  
16          whether a member of the state military forces is qualified to be advanced in grade,  
17          or in determining the assignment or transfer of a member of the state military forces,  
18          or in determining whether a member of the state military forces should be retained  
19          on active status, no person subject to this code may, in preparing any report, do any  
20          of the following:

21               (a) Consider or evaluate the performance of duty of any member as a member  
22               of a court-martial or witness.

23               (b) Give a less favorable rating or evaluation of any counsel of the accused  
24               because of zealous representation before a court-martial.

**322.38 Article 38—Duties of trial counsel and defense counsel.** (1) The

trial counsel of a general or special court-martial shall be an attorney licensed to practice in this state and shall prosecute in the name of the state, and shall, under the direction of the court, prepare the record of the proceedings.

(2) (a) The accused has the right to be represented in defense before a general or special court-martial or at an investigation under s. 322.32.

(b) The accused may be represented by civilian counsel at the provision and expense of the accused.

(c) The accused may be represented by any of the following:

1. Military counsel detailed under s. 322.27.

2. Military counsel of the accused's own selection if that counsel is reasonably available as determined under par. (g).

(d) If the accused is represented by civilian counsel, military counsel detailed or selected under par. (c) shall act as associate counsel unless excused by military judge at the request of the accused.

(e) Except as provided under par. (f), if the accused is represented by military counsel of his or her own selection under par. (c) 2., any military counsel detailed under par. (c) 1. shall be excused.

(f) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under s. 322.27 to detail counsel, in that person's sole discretion may do any of the following:

1. Detail additional military counsel as assistant defense counsel.

2. If the accused is represented by military counsel of the accused's own selection under par. (c) 2., may approve a request from the accused that military counsel detailed under par. (c) 1. act as associate defense counsel.

1 (g) The senior force judge advocate of the same force of which the accused is a  
2 member, shall determine whether the military counsel selected by an accused is  
3 reasonably available.

4 (3) In any court-martial proceeding resulting in a conviction, the defense  
5 counsel may do any of the following:

6 (a) Forward for attachment to the record of proceedings a brief of matters as  
7 counsel determines should be considered in behalf of the accused on review, including  
8 any objection to the contents of the record which counsel considers appropriate.

9 (b) Assist the accused in the submission of any matter under s. 322.60.

10 (c) Take other action authorized by this code.

11 **322.39 Article 39—Sessions.** (1) At any time after the service of charges  
12 which have been referred for trial to a court-martial composed of a military judge  
13 and members, the military judge may, subject to s. 322.35, call the court into session  
14 without the presence of the members for the purpose of any of the following:

15 (a) Hearing and determining motions raising defenses or objections which are  
16 capable of determination without trial of the issues raised by a plea of not guilty.

17 (b) Hearing and ruling upon any matter which may be ruled upon by the  
18 military judge under this code, whether or not the matter is appropriate for later  
19 consideration or decision by the members of the court.

20 (c) Holding the arraignment and receiving the pleas of the accused.

21 (d) Performing any other procedural function which does not require the  
22 presence of the members of the court under this code.

23 (2) These proceedings shall be conducted in the presence of the accused, the  
24 defense counsel, and the trial counsel and shall be made a part of the record. These

1 proceedings may be conducted notwithstanding the number of court members and  
2 without regard to s. 322.29.

3 (3) When the members of a court-martial deliberate or vote, only the members  
4 may be present. All other proceedings, including any other consultation of the  
5 members of the court with counsel or the military judge, shall be made a part of the  
6 record and shall be in the presence of the accused, the defense counsel, the trial  
7 counsel, and the military judge.

8 **322.40 Article 40—Continuances.** The military judge of a court-martial or  
9 a summary court-martial may, for reasonable cause, grant a continuance to any  
10 party for time, and as often, as may appear to be just.

11 **322.41 Article 41—Challenges.** (1) (a) The military judge and members of  
12 a general or special court-martial may be challenged by the accused or the trial  
13 counsel for cause stated to the court. The military judge or the court shall determine  
14 the relevancy and validity of challenges for cause and may not receive a challenge  
15 to more than one person at a time. Challenges by the trial counsel shall ordinarily  
16 be presented and decided before those by the accused are offered.

17 (b) If exercise of a challenge for cause reduces the court below the minimum  
18 number of members required by s. 322.16, all parties shall, notwithstanding s.  
19 322.29, either exercise or waive any challenge for cause then apparent against the  
20 remaining members of the court before additional members are detailed to the court.  
21 However, peremptory challenges shall not be exercised at that time.

22 (2) (a) Each accused and the trial counsel are entitled initially to one  
23 peremptory challenge of members of the court. The military judge may not be  
24 challenged except for cause.



1 (b) If exercise of a peremptory challenge reduces the court below the minimum  
2 number of members required by s. 322/16, the parties shall, notwithstanding s.  
3 322/29, either exercise or waive any remaining peremptory challenge, not previously  
4 waived, against the remaining members of the court before additional members are  
5 detailed to the court.

6 (c) Whenever additional members are detailed to the court, and after any  
7 challenges for cause against additional members are presented and decided, each  
8 accused and the trial counsel are entitled to one peremptory challenge against  
9 members not previously subject to peremptory challenge.

10 **322.42 Article 42—Oaths or affirmations.** (1) Before performing their  
11 respective duties, military judges, general and special courts-martial members, trial  
12 counsel, defense counsel, reporters, and interpreters shall take an oath or  
13 affirmation in the presence of the accused to perform their duties faithfully. The form  
14 of the oath or affirmation, the time and place of the taking, the manner of recording  
15 the same, and whether the oath or affirmation shall be taken for all cases in which  
16 these duties are to be performed or for a particular case, shall be as prescribed in  
17 regulation or as provided by law. These regulations may provide that an oath or  
18 affirmation to perform faithfully the duties as a military judge, trial counsel, or  
19 defense counsel may be taken at any time by any judge advocate or other person  
20 certified or designated to be qualified or competent for the duty, and if an oath or  
21 affirmation is taken, it need not again be taken at the time the judge advocate or  
22 other person is detailed to that duty.

23 (2) Each witness before a court-martial shall be examined under oath or  
24 affirmation.